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TEH SWEE LIP

v.

JADEMALL HOLDINGS SDN BHD

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COURT OF APPEAL, KUALA LUMPUR
RAMLY ALI JCA
DAVID WONG DAK WAH JCA
MOHD ZAWAWI SALLEH JCA
[CIVIL APPEAL NO: J-02-404-2010]

C

7 JULY 2013

CONTRACT: *Breach - Oral agreement - Joint venture agreement for development of land - Whether there was termination of agreement between original developer and deceased - Whether there was oral agreement*

D

allowing respondent to take over project - Failure to call pivotal witness - Evidence Act 1950, s. 114(g) - Whether invoked - Correspondences showed parties still negotiating terms and conditions of agreement - Whether formal agreement signed

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The appellant was the son of and was appointed as the administrator of the estate of the deceased, one Datin Lim Tuan ('Datin Lim'). During her lifetime, Datin Lim had entered into a joint venture agreement dated 7 October 1998 with Good Carriage Sdn Bhd ('Good Carriage') in respect of the Bentong land in which Good Carriage was appointed as the developer. On

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16 June 1999, Good Carriage and Datin Lim entered into a mutual termination agreement in which Good Carriage agreed to cease as the developer on the condition that Datin Lim paid Good Carriage the sum of RM80,000. It was the respondent's contention that Datin Lim through her eldest son, Teh Swee Seng ('Teh'), had agreed to allow the respondent to take over the project in consideration of the respondent agreeing to pay the sum of RM80,000 to Teh to pay off or compensate Good Carriage. Subsequent to the said payment, there were various correspondences between the parties in which the respondent contended that there existed an oral agreement in which they were allowed to take over the development of the Bentong land. The appellant contended that there was no such oral agreement on the ground that nothing had been agreed between the appellant and the respondent. Further, it was contended that Teh had no authority to act on behalf of Datin Lim. The High Court

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Judge found that the respondent had proved its case that an oral agreement had been entered into between the respondent and the appellant as represented by Teh and had allowed the respondent's claim that there was a breach of an oral agreement between the respondent and the appellant in respect of the construction project of houses on the appellant's land. Hence, the appellant appealed.

Held (allowing appeal with costs)
Per David Wong Dak Wah JCA delivering the judgment of the court:

(1) The respondent's case was premised on the fact that Teh had agreed on behalf of his mother to allow the respondent to take over Good Carriage in the development of the Bentong land. The respondent should have called Teh as a pivotal witness to prove the existence of the oral agreement and the payment of RM80,000. The non-calling of Teh as a witness may have given rise to the invocation of s. 114(g) of the Evidence Act 1950. (para 13)

(2) The burden to prove is on the person who asserts and in this case, it was the respondent who had asserted that there was an oral agreement and breach of the same. When the person is most privy to that assertion is not called as a witness, that burden has not been met (s. 101(1) Evidence Act 1950). For that reason alone, there was no necessity to invoke the 'adverse inference' available in s. 114(g) of the Evidence Act 1950 against the respondent. (para 15)

(3) The correspondences between the appellant and the respondent showed that the parties were still negotiating on the terms and conditions of the building agreement. In such circumstances, there could not be any 'meeting of minds' when parties are still negotiating. Until the terms have been agreed, there was to be no agreement. (paras 17-20)

(4) When there is a finding of fact by the trial court, the appellate court will be slow to overturn the findings except when the same is against the weight of evidence. The High Court Judge had erred in not looking at the totality of the evidence. If Her Ladyship had done that, she would have come to a different conclusion. Hence, this court was left with no other option but to interfere in this appeal. (para 21)

Bahasa Malaysia *Translation Of Headnote*

Perayu adalah anak kepada si mati dan telah dilantik sebagai pentadbir harta pusaka mendiang Datin Lim Tuan ('Datin Lim'). Semasa hidupnya, Datin Lim telah memasuki perjanjian usahasama bertarikh 7 Oktober 1998 dengan Good Carriage Sdn Bhd ('Good Carriage') berkenaan dengan tanah Bentong di mana Good Carriage telah dilantik sebagai pemaju. Pada 16 Jun 1999, Good Carriage dan Datin Lim telah memasuki perjanjian penamatan bersama di mana Good Carriage bersetuju untuk berhenti sebagai pemaju dengan syarat Datin Lim membayar Good Carriage jumlah sebanyak RM80,000. Adalah hujahan responden bahawa Datin Lim, melalui anak pertamanya, Teh Swee Seng ('Teh'), telah bersetuju untuk membenarkan responden mengambil alih projek tersebut sebagai balasan bagi responden bersetuju untuk membayar jumlah sebanyak RM80,000 kepada Teh untuk membayar dan memampas Good Carriage. Selepas pembayaran tersebut, terdapat pelbagai surat-menyurat antara pihak-pihak terlibat di mana responden berhujah bahawa wujudnya satu perjanjian lisan di mana pihaknya dibenarkan untuk mengambil alih pembangunan tanah Bentong. Perayu berhujah bahawa tiada perjanjian lisan yang wujud atas alasan bahawa tiada apa pun yang telah dipersetujui antara perayu dan responden. Selanjutnya, dihujahkan bahawa Teh tidak mempunyai kuasa untuk bertindak bagi pihak Datin Lim. Hakim Mahkamah Tinggi mendapati bahawa responden telah membuktikan kesnya bahawa terdapat perjanjian lisan yang termeterai antara responden dan perayu seperti yang digambarkan oleh Teh dan telah membenarkan tuntutan responden bahawa terdapat pelanggaran perjanjian lisan antara responden dan perayu berkenaan projek pembangungan kawasan perumahan di atas tanah perayu. Oleh itu, perayu merayu.

Diputuskan (membenarkan rayuan dengan kos)
Oleh David Wong Dak Wah HMR menyampaikan penghakiman mahkamah:

(1) Kes responden adalah berdasarkan fakta bahawa Teh telah bersetuju bagi pihak emaknya untuk membenarkan responden mengambil alih Good Carriage dalam pembangunan tanah Bentong. Responden sepatutnya memanggil Teh sebagai saksi penting bagi membuktikan kewujudan perjanjian lisan dan bayaran RM80,000. Kegagalan memanggil Teh sebagai saksi mungkin telah membangkitkan penggunaan s. 114(g) Akta Keterangan 1950.

(2) Beban pembuktian adalah atas orang yang menegaskan dan dalam kes ini, ia adalah responden yang telah menegaskan bahawa terdapat perjanjian lisan dan pelanggarannya. Apabila seseorang itu mempunyai kaitan dalam penegasan tersebut dan tidak dipanggil sebagai saksi, beban tidak dipenuhi (s. 101(1) Akta Keterangan 1950). Untuk alasan ini sahaja, tiada keperluan untuk menggunakan 'adverse inference' yang terdapat dalam s. 114(g) Akta Keterangan 1950 terhadap responden.

(3) Surat menyurat di antara perayu dan responden menunjukkan bahawa pihak-pihak yang terlibat masih berunding mengenai terma-terma dan syarat-syarat perjanjian pembangunan tersebut. Dalam keadaan sebegitu, tiada 'meeting of minds' apabila pihak-pihak masih berunding. Sehingga syarat-syarat telah dipersetujui, tidak terdapat perjanjian yang wujud.

(4) Apabila terdapat dapatan fakta oleh mahkamah perbicaraan, mahkamah rayuan tidak akan mengubah penemuan itu kecuali apabila ia bertentangan dengan keterangan. Hakim Mahkamah Tinggi telah khilaf apabila tidak melihat keterangan secara keseluruhan. Jika Yang Arif telah berbuat demikian, beliau akan mencapai keputusan yang berlainan. Oleh itu, mahkamah ini tidak mempunyai pilihan lain tetapi harus campur tangan dalam rayuan ini.

Case(s) referred to:
Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(refd)***
Masters v. Cameron [1954] 91 CLR 353 ***(refd)***
Sinar Wang Sdn Bhd v. Ng Kee Seng [2004] 3 CLJ 679 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 101(1), 114(g)

For the appellant - R Sivarasa (R Kengadharan with him); M/s R Kengadharan & Co
For the respondent - Mohd Faizal Ahmad; M/s Hazelin & Assocs

Reported by Suhainah Wahiduddin

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JUDGMENT

David Wong Dak Wah JCA:

Introduction

B **[1]** This is an appeal against the decision of the High Court in which the learned judge allowed the respondent's claim that there was a breach of an oral agreement between the respondent and appellant in respect of the construction project of houses on the appellant's land in Bentong, Pahang (Bentong land).

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[2] The appellant and respondent are the defendant and plaintiff respectively in the High Court.

[3] On 1 July 2013 we heard the appeal and after due consideration by us, we allowed the appeal for reasons set out D below.

Background Facts

[4] The appellant is the son of and was appointed as the E administrator of the estate of Datin Lim Tuan, deceased by an order of the court dated 20 August 2004. Datin Lim Tuan is the original defendant and the appellant was substituted as the defendant by virtue of a letter of administration dated 20 August 2004 of the estate of Datin Lim Tuan.

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[5] Datin Lim Tuan during her lifetime had entered into a joint venture agreement dated 7 October 1998 with Good Carriage Sdn Bhd in respect of the Bentong land in which Good Carriage Sdn Bhd was appointed the developer.

G **[6]** On 16 June 1999, Good Carriage Sdn Bhd and Datin Lim Tuan entered into a mutual termination agreement in which Good Carriage Sdn Bhd agreed to cease as the developer on the condition that Datin Lim Tuan pays Good Carriage Sdn Bhd "the sum of RM80,000 being the estimated value of the goods and H materials, site office and equipments left at the site".

[7] It is the contention of the respondent that Datin Lim Tuan through her eldest son Teh Swee Seng had agreed to allow the respondent to take over the project in consideration of the I respondent agreeing to pay the sum of RM80,000 to the eldest

son to pay off or compensate Good Carriage Sdn Bhd. Payment was effected by the respondent to a company allegedly linked to Teh Swee Seng.

[8] Subsequent to such payment, there were various correspondences between the parties in which the respondent contended that there existed an oral agreement in which they were allowed to take over the development of the Bentong land.

[9] The appellant's contention is simply that there was no such oral agreement on the ground that nothing had been agreed between the appellant and the respondent. Further it was contended that the eldest son had no authority to act on behalf of his mother Datin Lim Tuan.

High Court Decision

[10] The learned judge from the outset found that the respondent's cause of action is premised on breach of an oral agreement. As for the formation of the oral agreement, the learned judge's reasoning can be seen in this paragraph of her judgment:

> The Plaintiff (Respondent) has through oral evidence as adduced through SP1, SP2 and SP3 and documentary evidence established, *inter alia*, that:
>
> 1. The sum of RM80,000.00 was paid to Teh Swee Seng;
> 2. That the Deed of Mutual Termination was entered into after the payment of the sum of RM80,000.00 and this figure was expressly set out in clause 4 of the Deed of Mutual Termination; and
> 3. The draft Building Agreement was prepared by the Defendant's own solicitors and sent to the Plaintiff's solicitors and both solicitors had entered into correspondence to finalize the terms of the draft Building Agreement.
>
> I find that on the balance the Plaintiff has proved its case against the Defendant that an oral agreement had been entered into between the Plaintiff and the Defendant as represented by Teh Swee Seng. If Teh Swee Seng had not represented the deceased, then Messrs Loke, Chew & Zainal, who held out themselves to represent the Defendant, would not have proceeded to draft the Building Agreement and negotiate the terms of the draft Building Agreement.

A **Our Grounds Of Decision**

[11] As the learned judge premised on the existence of an oral agreement, it would be appropriate to remind ourselves of the basic ingredients required to create a contract. In *Sinar Wang Sdn Bhd v. Ng Kee Seng* [2004] 3 CLJ 679, the Court of Appeal cited with approval the following passage in *Masters v. Cameron* [1954] 91 CLR 353 (as did the Federal Court in the case of *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625):

> Where the parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.
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> In each of the first two cases, there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution.

[12] We now apply the above principle to the factual matrix herein.

[13] The respondent's case is premised on the fact that Teh Swee Seng had agreed on behalf of his mother to allow the respondent to take over Good Carriage Sdn Bhd in the development of the Bentong land. That being the case, we are surprised (to put in mildly) why the respondent did not call Teh Swee Seng as a witness to prove the existence of the oral agreement and the payment of RM80,000. We are of the view

that Teh Swee Seng is a pivotal witness and the non calling of him as a witness may give rise to the invocation of s. 114(g) Evidence Act.

[14] He is a pivotal witness for the simple reason that he could have resolved the matters raised by learned counsel for appellant which are as follows:

(i) Did SP1 make the payment to Teh Swee Seng as trustee for his mother?

(ii) Why was the payment made to Syarikat Kien Seng allegedly linked to Teh Swee Seng?

(iii) Why was not anyone from Syarikat Kien Seng to confirm that the payment was meant for Good Carriage Sdn Bhd?

(iv) Why was there no document to support the payment and receipt of RM80,000?

These matters remain unresolved to the detriment to the respondent which with respect was not considered by the learned judge.

[15] At the risk of repetition, we wish to remind litigants and their legal advisers that it must not be forgotten that the burden to prove is on the person who asserts and in this case it is the respondent who had asserted that there was an oral agreement and breach of the same. And when the person who is most privy to that assertion is not called as a witness, that burden has not been met (see s. 101(1) Evidence Act). For that reason alone there is no necessity for us to invoke the 'adverse inference' available in s. 114(g) of the Evidence Act against the respondent.

[16] The learned judge also relied on the fact the preparation of the draft building agreement by Loke Chew & Zainal and the sending of the same to the respondent's solicitor Yacob Atan & Associates to infer that if there is no concluded agreement why should the appellant send a draft to the respondent. With respect this inference cannot be drawn as it does not take into consideration of the other evidence before the court.

[17] If one is to look at the letter dated 25 August 1999 written by the respondent's solicitors to the appellant's solicitors (which is a letter of reply to the draft building agreement requesting for

some changes to the terms and conditions contained therein), there contains two illuminating words: 'counter propose'. These two words in our view in their natural meanings can only mean one thing and that is the parties are still negotiating on the terms and conditions of the building agreement. In such circumstances, there cannot be any 'meeting of minds' when parties are still negotiating.

[18] Furthermore, the letter dated 28 October 1999 by the appellant's solicitor in reply to the respondent's letter dated 25 August 1999 makes it crystal clear that there is to be no agreement until a formal agreement is signed. Our reasons for saying that are these.

[19] That letter dated 28 October 1999 is firstly marked 'without prejudice' and what that means in law is that letters written on a without prejudice basis is not admissible in evidence of the negotiations undertaken. The rationale of such principle is simply not to hamper but to encourage and enlarge the scope of negotiations so that an acceptable solution between the parties can be easily reached. Counsel for the appellant had not submitted to us good reasons why we should depart from established law.

[20] In any event, it also contained a concluding paragraph which reads as follows:

> Please let us have your client's comment in the aforesaid within Twenty-One (21) days from the date hereof.
>
> However, if no formal agreement has been agreeable by the parties within seven (7) days thereafter, all negotiations are deemed to have been aborted.

Of course there was no reply to the just mentioned letter. Hence the parties cannot be any clearer and that is until the terms have been agreed there is to be no agreement. In the circumstances we find that what we have in this appeal is the third category of cases mentioned in *Masters v. Cameron (supra)*.

Conclusion

[21] We are fully aware of the established principle of law that when there is a finding of fact by the trial court, the appellate court will always be slow to overturn the findings except when the same is against the weight of evidence. In this appeal, we are of

the view that the learned judge had erred in not looking at the totality of the evidence and if she had done that we have no doubt she would have come to a different conclusion. Hence we are left with no other option but to interfere in this appeal.

[22] For reasons stated above, we allowed the appeal with costs in the sum of RM20,000 for here and below. Accordingly the judgment of the High Court is set aside and we also order that the deposit be refunded to the appellant.